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THE STANDARD OIL CASE AND THE SHERMAN ACT. — In a recent decision of the Circuit Court, important rather for its affirmance of principles already established in previous cases under section 1 of the Sherman Act than for any new propositions laid down, the Standard Oil Company of New Jersey is declared a combination in restraint of trade and a monopoly within sections 1 and 2 of the Sherman Act.[1] *U. S.* v. *Standard Oil Co. of N. J.*, 173 Fed. 177 (Circ. Ct., E. D. Mo., Nov. 20, 1909). For the determination of the legality of the combination under section 1 the common-law test of reasonableness[2] is disregarded in favor of that of directness: whether the necessary effect of the combination is directly or merely incidentally to restrict competition in interstate commerce.[3] The exchange of stock of competitive corporations for the stock of a single corporation, where the substance of the transaction is simply a change in the form of investment and not an outright purchase for cash or its equivalent,[4] has

[1] 26 U. S. Stat. at L. 209, § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor."

§ 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."

[2] As to this test see U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290; Chesapeake & O. Fuel Co. *v.* U. S., 115 Fed. 610; 17 HARV. L. REV. 480.

[3] As to the application of this test see Hopkins *v.* U. S., 171 U. S. 578; Swift & Co. *v.* U. S., 196 U. S. 375; 22 HARV. L. REV. 216.

[4] Where the transaction constitutes an outright sale of a business it is not within the Sherman Act. Davis *v.* Booth, 131 Fed. 31, 36. See 19 HARV. L. REV. 472.

already been held an illegal combination within section 1 of the Act.[5] *A fortiori* a combination is illegal in which the holding company is itself one of the formerly competing corporations.[6] This being the situation in the present case, there has clearly been a violation of section 1 of the Act.

Stress is laid by counsel for the defendant on the fact that the majority stock of the nineteen principal subsidiary companies was previously held in joint ownership, so that these corporations had not been actual competitors for a time long prior to the passing of the Act.[7] The court, however, considers that under this joint ownership they were potentially competitive; and that since there is much less probability of their separating and becoming again actually competitive when the stock is held by a single corporation than when held in joint ownership by individuals, the combination is in direct restraint of trade. That the mere vesting of the power to prevent competition, without exercise of that power, is within the prohibition of the Act has already been determined.[8]

For the decision of the majority of the cases under the Sherman Act, as in the persent case, it has been sufficient to find the defendant guilty of a violation of section 1. But as the violation of section 2 is a separate offense,[9] the discussion in the main case of what constitutes a monopoly under that section is of interest. As yet there has been no authoritative construction of section 2 by the Supreme Court, and few direct decisions in the circuit courts.[10] Monopolization, as covered by this section, has been held to embrace two elements: the exclusive right to, or control of trade, and the exclusion of others from that right or control.[11] Furthermore, it is agreed that the monopoly need not be complete.[12] The suggestion that, as with a combination under section 1, its necessary effect must be directly, not incidentally, to restrict commerce, aids but little in the determination of its legality.[13] Nor is the mere magnitude of the business a guiding test.[14] It is submitted that the legality of a monopoly must depend upon the character of the means used in its establishment. The acquisition of control of interstate commerce by ordinary legitimate methods of business is not illegal.[15] On the other hand, a monopoly falls within the

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[5] Northern Securities Co. *v.* U. S., 193 U. S. 197.

[6] U. S. *v.* American Tobacco Co., 164 Fed. 700; Bigelow *v.* Calumet & Hecla Mining Co., 155 Fed. 869.

[7] A trust in which the ownership of the majority of these corporations was vested had been formed as early as 1879.

[8] Northern Securities Co. *v.* U. S., *supra*, as explained in Harriman *v.* Northern Securities Co., 197 U. S. 244, 291.

[9] U. S. *v.* MacAndrews & Forbes Co., 149 Fed. 836.

[10] For a discussion of the early authorities under this section see 7 HARV. L. REV. 338, 352.

[11] *In re* Greene, 52 Fed. 104, 115; U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 82.

[12] See Bigelow *v.* Calumet & Hecla Mining Co., *supra*.

[13] It was so suggested in Whitwell *v.* Continental Tobacco Co., 125 Fed. 454, 462.

[14] See *In re* Greene, *supra*.

[15] Thus the following transactions have been held unobjectionable under section 2 of the Sherman Act: the arbitrary fixing of prices, Dueber Watch Case Mfg. Co. *v.* Howard Watch Co., 55 Fed. 851; mutual agreements not to do business with persons dealing with a certain competitor, *Ibid.*; agreements to give rebates for maintenance of list prices and exclusive trade, *In re* Corning, 51 Fed. 205; *In re* Greene, *supra;* the restriction of trade to those who refrain from dealing with competitors, Whitwell *v.* Continental Tobacco Co., *supra*.

meaning of section 2 of the Act when it has been secured by methods contrary to common law [16] or statute. Accordingly a "contract, combination, or conspiracy" in restraint of interstate commerce illegal under section 1 of the Act should constitute such unlawful means as to bring any resulting monopoly within the prohibition of section 2. And as the court is undoubtedly correct in holding that there has been in the present case an illegal combination under section 1, their further conclusion that the defendants are also guilty of a violation of section 2 seems therefore logically to follow.

INTENTION REQUISITE TO EFFECT A CHANGE OF DOMICILE. — Less than a century ago doubt was expressed whether an Englishman could by any acts and intentions change his English domicile; [1] but this doubt was speedily put an end to by the ecclesiastical courts by whom it had first been voiced.[2] A generation later it was laid down that for a change of domicile there must be a change of nationality; that is, an Englishman, to acquire a French domicile, must live in France with intent to become a Frenchman.[3] But these strong expressions were presently given a mild interpretation; [4] and it is now clear law that domicile may be abandoned although nationality is retained.[5] Some English authority [6] turned with approval to the Scotch doctrine that for change of domicile there must be an intent to acquire a new civil status; [7] that is, an Englishman in France might acquire a French domicile only by a conscious though, it might be, unexpressed choice of French law. But as the deliberate rejection and selection of systems of law is obviously rare among laymen, it is not unfortunate that this doctrine was subsequently denied.[8] An eminent text-writer,[9] however, revised and revived it, citing authority [10] for the proposition that a man may change his domicile only by a conscious choice of foreign law or by action necessarily involving an unconscious choice. But that such theory is not the present English law, its learned proponent himself has very recently admitted.[11] Under the modern decisions there is a change of domicile whenever there is a change of residence to any Christian country, concurring with an intent that the change be permanent.[12]

This latest English test for change of domicile has been adopted by many cases in this country.[13] By others a variety of rules have been pro-

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[16] Thus threats, intimidation, and violence are unlawful common-law means. U. S. *v.* Patterson, 55 Fed. 605, 641.

[1] Curling *v.* Thornton, 2 Add. 6.
[2] Stanley *v.* Bernes, 3 Hagg. Eccl. 373.
[3] Moorhouse *v.* Lord, 10 H. L. Cas. 272.
[4] Udny *v.* Udny, L. R. 1 Scotch App. 441.
[5] Brunel *v.* Brunel, L. R. 12 Eq. Cas. 298.
[6] Attorney-General *v.* Countess de Wahlstatt, 3 H. & C. 374.
[7] Donaldson *v.* McClure, 20 D. (Scotch Sess. Cas., 2d ses., 1857) 307.
[8] Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617.
[9] Westlake, Priv. Int. L., 4 ed., § 256, (3).
[10] Sharpe *v.* Crispin, L. R. 1 P. & D. 611.
[11] Westlake, Priv. Int. L., 4 ed., § 256, (3).
[12] Lord *v.* Colvin, 4 Drew. 366; Winans *v.* Attorney-General, [1904] A. C. 287.
[13] The Venus, 8 Cranch 253; Carey's Appeal, 75 Pa. St. 201. The only reflection found of the older English requirements of intent to change nationality or status is in Dupuy *v.* Wurtz, 53 N. Y. 556.